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**BLACKMAIL, EXTORTION AND FREE SPEECH: A REPLY
TO POSNER, EPSTEIN, NOZICK AND LINDGREN**

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BLACKMAIL, EXTORTION AND FREE SPEECH: A REPLY TO POSNER, EPSTEIN, NOZICK AND LINDGREN

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At one time in the history of the law "blackmail" and "extortion" were used synonymously to denote the demand for money or other valuable consideration upon the threat of force or violence.¹ Such acts were proscribed by law; very properly so, since the bedrock of civilized order is that people refrain from initiating force or fraud or the threat thereof against each other.

But while "extortion" has continued to be used in this restricted manner, the concept of "blackmail" has been expanded enormously.² Nowadays, blackmail is used to denote practically any commercial practice strongly disapproved of by the speaker, such as the OPEC price increase,³ as well as what is still meant by extortion. This is unfortunate, if only on semantic grounds. But it is even more problematic since there is now no concept in the English language which unambiguously refers to a demand for money or other valuable consideration under the threat of exercising one's right of free speech by publicizing someone else's secret *without* use of the threat of force or violence.

For the purposes of this Article, we shall define blackmail in precisely that way. In Section I, we make and defend the claim that the

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1. Winder, *The Development of Blackmail*, 5 *MOD. L. REV.* 21, 23-24 (1941).

2. According to the Oxford English Dictionary, blackmail was first used in its modern sense in 1840. 1 *OXFORD ENGLISH DICTIONARY* 895 (1971). See also Block, *Trading Money for Silence* 2-6 (1985) (unpublished manuscript) (to be published in *THE ECONOMIC APPROACH APPLIED OUTSIDE THE TRADITIONAL AREAS OF ECONOMICS* (G. Radnitzky & P. Bernholz eds. 1986)).

3. See, e.g., P. JOHNSON, *MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE EIGHTIES* 667 (1983).

prohibition of blackmail is incompatible with the philosophy underlying our criminal law. In Sections II, III, IV and V, we consider and reject objections to this thesis made by, respectively, Richard Posner,⁴ Richard Epstein,⁵ Robert Nozick⁶ and James Lindgren.⁷

I. IN DEFENSE OF LEGALIZING BLACKMAIL

As defined, blackmail should not be accorded the legal sanctions usually meted out in response to criminal behavior since it does not entail the violation of rights.⁸ Rather, it consists of the offer of a commercial trade. The blackmailer will remain silent about the humiliating, embarrassing or even criminal secret of the blackmailee,⁹ accepting payment in return. If the offer to trade money for silence is rejected, the blackmailer will publicize the secret, which is part of his rights of free speech. In these terms the distinction between extortion and blackmail may be made as follows: extortion utilizes a threat to do something illicit, such as commit murder, arson or kidnapping. The threat of blackmail is limited to what would otherwise be licit—commit an act of free speech. If a person has the right to *do X*, he necessarily has the right to give warning of the fact that he will do or may do *X*—that is, to threaten to do *X*. Blackmail is thus a noncriminal act.

Blackmail, then, is a "capitalist act between consenting adults," to use the felicitous phrase introduced by Robert Nozick.¹⁰ As such, ac-

4. R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977). See *infra* notes 14-22 and accompanying text.

5. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983). See *infra* notes 24-44 and accompanying text.

6. R. NOZICK, *ANARCHY, STATE, & UTOPIA* (1974). See *infra* notes 45-57 and accompanying text.

7. Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984). See *infra* notes 58-63 and accompanying text.

8. Block, *supra* note 2, concluded as follows:

Let nothing said above be interpreted as affirming the propriety or morality of blackmail. This practice has not been claimed to be ethical. Our only claim is that blackmail is not akin to theft, not an invasive act, nor threat thereof, nor an initiation of violence, nor a violation of rights—and that therefore it should not be prohibited by force of law.

Our present blackmail statutes are violations of the free speech rights of blackmailers. They do not protect the persons or property of the so-called victims of blackmail. Society would be better of [sic], and human rights more secure, if our blackmail legislation were terminated.

Id. at 52-53 (footnote omitted).

9. Just as the law cannot properly compel the individual to be a good Samaritan, so can it not compel him to acquaint the legal authorities with the facts concerning crimes he knows to have taken place. Turning in the criminal may thus be an act over and above the call of duty, but it is not an act of duty itself.

10. R. NOZICK, *ANARCHY, STATE, & UTOPIA* (1974).

ording to the laws of economics, it must benefit both parties.¹¹ It is easy to see how the blackmailer gains from the trade. He is paid merely for holding his tongue. But the "victim" also gains. Both parties gain from a voluntary trade, and this is as true of the exchange of money for silence as it is for any other case. The payment extracted must be worth less to the victim than the costs of having his secret uncovered. Otherwise he or she would reject the deal, stating in effect, "Publish and be damned!"¹² In contrast to the gossip, who tells the secret without even affording the victim the opportunity of purchasing silence, the blackmailer can be seen as a benefactor.

Also, blackmail has social, or spillover, benefits. Were it legalized, the presumption is that more people would engage in this activity. If this occurred, real criminal activity would be retarded. The miscreants would now have to share their ill-gotten gains with the blackmailer. This would reduce the expected gain from criminal activity,¹³ since the apprehended perpetrator would not only have to give up his booty, but would also be penalized up to the value he places on not going to jail, which may well be higher than the proceeds of any specific crime.

II. POSNER: THE EFFICIENCY OBJECTION TO BLACKMAIL

One objection to our account of blackmail has been put forth by Richard Posner.¹⁴ He begins by confining himself to cases where the threat of the blackmailer is to expose a crime committed by the blackmailee. In Posner's view, "[o]verenforcement of the law would result if the blackmailer were able to extract the full fine from the offender."¹⁵ His reasoning seems to be that if the state subjects the criminal to the optimal fine, and the blackmailer extracts his own pound of flesh, then the total amount of enforcement will be too high.

But this is, at best, highly conjectural. It can hardly be assumed that government has in its infinite wisdom hit upon precisely the optimal fine, nor does Posner put forth any evidence to back up such a claim. As Epstein trenchantly remarks, this "explanation . . . presupposes that we have reason to believe that the current level of public enforcement is opti-

11. See, e.g., R. NOZICK, *supra* note 10, at 84-87.

12. This quote is attributed to Arthur Wellesley, Duke of Wellington, when his mistress threatened to publish her diary and his letters. J. BARTLETT, *FAMILIAR QUOTATIONS* 506a (E. Beck 14th ed. 1968).

13. W. BLOCK, *DEFENDING THE UNDEFENDABLE* 53-58 (1976).

14. R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).

15. R. POSNER, *supra* note 14, at 473. See also Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 42-43 (1975).

mal by some standard. Standing alone, it cannot explain why blackmail is considered criminal without regard to mode or levels of public enforcement."¹⁶

The Posnerian objection could be couched in terms of resources allocated toward the apprehension of criminals instead of in terms of optimal levels of fines or payments imposed by the blackmailer. Given that the blackmailer works as a sort of private enterprise policeman—discouraging crime by threatening to capture its fruits for himself—the resources he expends, added to the public resources devoted to this task, might result in an overallocation of resources. But this would be true if and only if the public investment in this activity is optimal. The overallocation claim also founders on the unproven assumption that governmental activity in this area is perfectly allocated.

Posner fails to show that a public monopoly of law enforcement is optimal. He argues that "an efficient criminal sanction will ordinarily involve combining a severe penalty with a relatively low probability of apprehension and conviction."¹⁷ That is to say, instead of attempting to capture each and every criminal in order to maximize profits, as a private agency might, a public monopoly of law enforcement can take a more efficient path. It can devote relatively few resources to catching criminals and deal harshly with those it does catch, without any loss in deterrent effect. Why is this? Deterrence, Posner correctly maintains, is a function of the severity of the sentence multiplied by the probability of enforcement.¹⁸ The state can compensate for decreases in one variable by increasing the other. Hence, Posner concluded that a public monopoly of law enforcement could spend less on catching criminals than private agencies, and not necessarily reduce deterrence.¹⁹ With a public monopoly, as the probability of having a sentence enforced is decreased, the severity of the sentence could be increased.

But this ingenious argument, even if correct, fails as a reason not to legalize blackmail. At best it shows that a monopoly of law enforcement is more efficient than a system of private agencies. It does not show that a combination of public and private enforcement is less efficient than a public monopoly alone. Perhaps the augmented deterrence which blackmail would add to public enforcement is optimal, even if one concedes to Posner that a public agency is needed.

Posner's reply here is obvious. Wouldn't it be more efficient, if pri-

16. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 561-62 n.15 (1983).

17. R. POSNER, *supra* note 14, at 463.

18. *Id.* at 165.

19. *Id.* at 463.

vate deterrence augments a public agency, to provide the augmented deterrence simply by increasing the severity of the sentences? But this need not be the case. It may turn out that beyond a certain point people will be so unwilling to enforce a sentence that the product of the sentence multiplied by the probability of application will be insufficient to secure much deterrence. Presumably this is why sentencing parking violators to death would not be efficient. It does not automatically follow that the higher the sentence the less that can be spent on enforcement, and still keep the level of deterrence constant.

One might wonder whether the argument can be carried a stage further. How do we know—given that a public agency is not necessarily more efficient than a private one—that a public agency is more efficient in overall deterrence than a system of private agencies? We do *not* know this; however, it does seem plausible that the effect Posner describes operates at some level. To the extent that it does, an agency aimed at providing deterrence most efficiently is in a position, by taking advantage of Posner's effect, to spend fewer resources on enforcement than an agency interested in maximizing revenue from criminals. This, however, introduces a further qualification to Posner's argument. An agency interested in providing deterrence most efficiently need not be a *public* agency, much less a monopoly. Why can't a private protection agency aim at providing deterrence efficiently? For all Posner has shown, a private agency can do so as long as it aims at maximizing its revenue by fees from consumers rather than from fines, or at least not exclusively from fines.

There is, however, a more basic reason for dismissing Posner's objection to our analysis of blackmail. Let us assume that government crime prevention activity, whether in terms of fines specified or resources expended, is optimal. Under such an assumption, of course, it would be true that both public and private efforts, added together, are overoptimal. Still, it does not follow that private initiatives such as blackmail must be reduced, let alone prohibited. For there is an alternative—diminish or eliminate the public sector! There are several reasons for preferring this option.

First, the *raison d'être* for state action is that private efforts will not be forthcoming, or will be insufficient (e.g., the free rider problem and external neighborhood effects).²⁰ However, such a situation does not prevail in this case. Far from there being insufficient or no private activity, Posner's complaint is that the blackmailer, in conjunction with the

20. See, e.g., M. FRIEDMAN, CAPITALISM AND FREEDOM 22-36 (1962).

government, will overallocate resources to crime prevention. Therefore, if public plus private efforts are superfluous, and if the argument for government activity is based on the absence of individual initiatives, then it is the former which should be cut back, not the latter.

There is a second reason for curtailing the public rather than the private sector. This has to do with the concept of an optimal amount of investment in crime prevention. This may be paradoxical to some. At a time of rampant criminality, at a time when numerous public opinion polls have shown that this is an issue of great if not prime importance to an outraged citizenry, it may appear grotesque to think of too many resources being devoted to prevention of crime. Nevertheless, the concept does make sense. As more funds are devoted to this task, there is a point where each dollar buys less additional crime reduction. Eventually, the utility of an extra dollar spent in this way will fall below its value in alternative pursuits. We could, in the extreme case, spend the entire Gross National Product on dealing with crime while starving to death.

But this level of expenditure depends solely on the preference of the individual (as does the rate, extent and even existence of the declining utility of money spent in retarding crime). Some people may be passionately devoted to this enterprise; others may be pacifists on the crime question; and most will occupy a middle ground.

Consider the analogy to charity. Assume that both private and public charitable efforts, taken together, are excessive. Under our first line of argument, the latter, not the former, should be reined in since the *raison d'être* for welfare is the insufficiency or nonexistence of private charity. According to our second line of argument, private charity, at whatever level, simply cannot be excessive, since it depends entirely on the subjective value preferences of the individuals concerned.²¹

What of cases where the blackmailer's threat is not to expose a crime of his "victim," but to make known an embarrassing, but not illegal, episode in his life? Here, too, Posner favors the prohibition of blackmail. In his view blackmail should be

forbidden in areas where there are no legal prohibitions at all—
where the information would humiliate, but not incriminate,

21. In making this claim, we must of course, consider the possibility of external economies. Obviously, if person *A* contributes to charity, or squelches crime by blackmailing, person *B* can reduce his own efforts and "free ride" on *A*. But this is an explanation for the possible underallocation of resources in these activities, not overallocation as feared by Posner. Also, this phenomenon can take place in either the public or private sector. Since here we are concerned with distinguishing between these alternatives, possible positive externalities can be safely ignored.

the blackmailer's victim. The social decision not to regulate a particular activity is a judgment that the expenditure of resources on trying to discover and punish it would be socially wasted. That judgment is undermined if blackmailers are encouraged to expend substantial resources on investigating people engaged in the activity.²²

This argument seems to be a complete *non sequitur*. The decision not to regulate a particular activity is based, at most, only on the view that it would not be efficient to spend public resources to enforce public regulations. This provides no insight into the efficiency of also spending private resources that will partly deter the activity. Posner contents himself with deducing that such an activity is "socially wasteful" from the fact that blackmail of noncriminals is prohibited.²³ But this circular tack proves far too much. If mere legal prohibition of *X* proves *X* to be "socially wasteful," how can we analyze, for example, the prohibition of alcohol in the U.S. during the 1930's? Must we say that alcohol consumption was "socially useful" before and after Prohibition, while "socially wasteful" only during this era? If we do, our only "evidence" will be the law of the land. Posner's circular opposition to the legalization of blackmail is not based on any theory of law; it is merely an *ad hoc* expression of Posner's own subjective tastes on the matter. Perhaps Posner's argument is that since enforcement is inefficient, private enforcement would be inefficient as well. But we have already seen a reason to reject this premise. Posner has *not* demonstrated the superior efficiency, in all cases, of public enforcement.

Even if one grants Posner all his arguments about the inefficiency of blackmail, it does not follow that he has made a case for its prohibition. Perhaps trying to prohibit blackmail is also inefficient. If it is, putting up with the inefficiencies Posner discusses may be worthwhile. If the inefficiencies of prohibiting blackmail outweigh the inefficiencies of blackmail itself, this needs to be shown by argument. Nonetheless Posner says nothing about the inefficiency of prohibiting blackmail.

Finally, there is one further weakness in Posner's treatment of blackmail. Suppose that all he says is correct. Then, blackmail must be a wasteful and inefficient means of deterring crime and of interfering with noncriminal customs. Does it follow from this that blackmail should be prohibited? Is it a crime to be an inefficient enforcer of law? Should our analysis be focused on the effect of blackmail as a deterrent of certain

22. R. POSNER, *supra* note 14, at 473.

23. *Id.*

certain
 types of behavior? While its effects in this area are extremely important the primary aim of the activity is to secure certain gains to those engaged in it. To make a case for the prohibition of blackmail on the grounds of efficiency, one must show that there is something "wrong" with transactions of this kind. That blackmail is not the best means to achieve some other purpose (i.e., law enforcement) is of secondary significance. This holds true, of course, unless blackmail's effect on law enforcement is socially more important than the direct gains and losses of the transaction. But this would need to be shown by argument.

III. EPSTEIN: MORALITY AND BLACKMAIL, INC.

We now turn to the case made by Richard Epstein in support of prohibiting blackmail.²⁴ At first blush, this is a rather unlikely statement, since the first two sections of *Blackmail, Inc.* constitute perhaps the most magnificent, comprehensive, insightful, articulate, careful and well-reasoned *defense* of the legalization of blackmail ever penned.

Epstein begins by resisting Posner's claim that the matter is settled merely because a legislature holds an activity to be illegal.

It is a grave mistake to confuse the necessary conditions of notice and codification with the sufficient substantive conditions for criminal responsibility. If the legislature sought to declare marriage, schooling, or gardening criminal offenses, in all likelihood it could define their content with sufficient precision to avoid any procedural challenges based upon the want of notice. But even in a system that placed no constitutional limitations upon the legislative power (as is still the case in England, where much of this debate has originated) to declare a certain activity criminal, we should still demand some explanation of why this particular activity, but not others, should be classified as illegal.²⁵

Epstein continues with a moral theory of criminal responsibility that is nothing less than superlative in its focus on force or fraud, or the threat thereof, as the essence of criminal activity.²⁶ He also recognizes the *sine qua non* of blackmail analysis: that the blackmailer threatens to do that which he otherwise has a complete right to do, that is, to exercise his rights of free speech. As stated by Epstein, "where a person *has* the right

24. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983).

25. *Id.* at 554.

26. *Id.* at 555-56. For a fully developed legal philosophy based on this insight, see generally, M. ROTHBARD, *THE ETHICS OF LIBERTY* (1982).

to do a certain act—for example, not to sell goods at a particular price—he has the right to threaten to do that act.”²⁷ Going over and above the call of duty, Epstein even recognizes that the only exception to the legitimacy of blackmail is when the information utilized is discovered improperly through force or fraud.²⁸

Epstein then attempts “to account for the powerful sentiment that blackmail should be criminal.”²⁹ Given the airtight defense of the case for legalization he has just rendered, this is no easy task. He begins by leaving off the micro discussion of the blackmailer and the blackmailee, and takes up the macro level of the larger social framework. Epstein asks: “[W]hat would the world look like if blackmail were legalized to the extent that seems to be required by our general moral theory?”³⁰ His answer is Blackmail, Inc., a large corporation in the “open and public” blackmail market, which would offer to acquire information leading to the degradation or humiliation of people—so that silence about these secrets could be sold to them.³¹ He forecasts, quite reasonably, that the contracts Blackmail, Inc. would draw between itself and its suppliers of information would be quite complex.³² Maybe so. But this complexity hardly justifies his claim that he has borne “limited fruit” in his quest to justify the prohibition of blackmail.³³ For one thing, he has not demonstrated that if blackmail were legalized, large firms engaging in blackmail would arise on the market. Blackmail, Inc. is a possibility; but for all Epstein has shown, it is no more than a possibility. Yet his argument in part turns on the existence of such firms.

Next, Epstein considers the commercial relationship between Blackmail, Inc. and the blackmailee. Here he believes that he has uncovered the essential evil of blackmail. First, not only may Blackmail, Inc. demand money of the blackmailee, but if the latter does not have the requisite funds, the corporation may hint, “ever so slightly, that it thinks strenuous efforts to obtain the necessary cash should be undertaken.”³⁴ Continues Epstein, “[d]o we believe that [the blackmailee] would never resort to fraud or theft given this kind of pressure, when the very nature of the transaction cuts off his access to the usual financial sources, such

27. Epstein, *supra* note 24, at 557 (emphasis in original).

28. *Id.* at 558-60. See also Block, *supra* note 2, at 2-43 (providing an argument which parallels the treatment of blackmail found in the first two sections of Epstein's paper).

29. Epstein, *supra* note 24, at 562.

30. *Id.* (emphasis in original removed).

31. *Id.* at 563.

32. *Id.*

33. *Id.* at 563-64.

34. *Id.* at 564.

as banks or friends, who would want to know the purpose of the loan?"³⁵ Secondly, not only can Blackmail, Inc. engage in blackmail, but as a "full service firm" it can help the blackmailee uphold the fraud and deceit he perpetrates on the people from whom he hides his guilty secret.³⁶

Here we arrive at the nub of the matter, Epstein's reason why blackmail should be prohibited by law. "We now see the critical difference between blackmail and kindred transactions, such as the protection of trade secrets. Only blackmail breeds fraud and deceit."³⁷ But this will not do.

For one thing, it proves far too much. Yes, the legalization of blackmail may well encourage and cause the "victim" to make "strenuous efforts" to engage in fraud or theft to pay off his tormentor. But people steal for so many other reasons: impressing their friends, "buying baby a new pair of shoes," poverty, alcoholism, addiction, jealousy, dares, and for various and sundry political ideals. If blackmail should be prohibited because it may encourage crime, so should these other activities. This is surely unacceptable. What should be legally proscribed is crime itself, not phenomena which may or may not³⁸ lead to criminal behavior.

Epstein's second criticism, on the grounds of supporting fraud,³⁹ fails on the same ground. Yes, Blackmail, Inc. may better enable the bed wetter, the communist or the homosexual to keep his secret, perpetuating the "fraud" he practices on those who would do him ill, if they only knew. However, since these activities are not prohibited, how can it be a punishable offense to help these potential blackmailers keep their guilty secrets? If *X* is a legal, nonprohibited act, and *A* helps *B* carry it out, Epstein's attempt to justify the criminalization of blackmail is equivalent to urging the incarceration of *A* but not *B*!

In the first sections of his article, Epstein was quite clear that threats of force or fraud were the necessary and sufficient conditions for categorizing an activity as criminal. But in his sociological Section III, although he still maintains this distinction,⁴⁰ he appears to have lost sight

35. *Id.*

36. *Id.*

37. *Id.* at 564-65.

38. States Epstein: "Blackmail is made a crime not only because of what it is, but because of what it necessarily leads to." *Id.* at 566 (emphasis added). But this is surely incorrect. Is it really necessary that the "victim" of blackmail give in to his baser instincts and engage in real crime? Cannot even one blackmailee resist the temptation? Surely there is no logical contradiction in supposing that a blackmailee could overcome the temptation to commit the crime.

39. *Id.* at 564.

40. The blackmailee "is subject only to blackmail, not the threats of force or fraud." *Id.* at 565.

of its vital importance.

Perhaps this arises out of a confusion between morality (the study of what is or is not immoral) and legal philosophy (the study of what should or should not be prohibited by force of law). Epstein holds that "[a]s a *moral* matter . . . blackmail is criminal because of its necessary tendency to induce deception and other wrongs."⁴¹ He claims that blackmail "breeds fraud and deceit,"⁴² and characterizes it as "sneaky and dirty."⁴³ Blackmail may well be underhanded, evil, vicious, reprehensible and immoral. But this is entirely beside the point. Our concern here is solely with the question of the criminal, not moral, status of blackmail.⁴⁴ Unless Epstein advocates that *all* immoral people be incarcerated, he must relinquish his opposition to the legalization of blackmail. He may have successfully explained why blackmail is abhorrent in popular sentiment, but he has not justified its legal prohibition.

IV. NOZICK: BLACKMAIL AS AN UNPRODUCTIVE EXCHANGE

A third objection, developed by Robert Nozick,⁴⁵ arises in the realm of philosophy. Nozick begins his critique of the position staked out in this article by distinguishing between productive and nonproductive activities. If a set of exchanges

were impossible or forceably prohibited so that everyone knew they couldn't be done, one of the parties to the potential exchange would be no worse off. A strange kind of productive exchange it would be whose forbidding leaves one party no worse off! (The party who does not give up anything for the abstention, or need not because the neighbor has no other motive to proceed with the action, is left better off). Though people value a blackmailer's silence, and pay for it, his being silent is not a productive activity. His victims would be as well off if the blackmailer did not exist at all, and so wasn't threatening them. And they would be no worse off if the exchange were known to be absolutely impossible.⁴⁶

On the basis of this distinction, Nozick would allow, as a productive

41. *Id.* (emphasis added).

42. *Id.*

43. *Id.* at 566. Epstein also argues against blackmail on the grounds that it leads to the concealment of information. His argument is effectively criticized in Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 684-87 (1984).

44. See *supra* note 8.

45. R. NOZICK, *ANARCHY, STATE, & UTOPIA* (1974).

46. *Id.* at 85 (footnote omitted).

exchange, a person to purchase your neighbor's abstention from building a "monstrosity" on his land, which "he has a right to do."⁴⁷ However, suppose

that the neighbor has no desire to erect the structure on the land; he formulates his plan and informs you of it solely in order to sell you his abstention from it. Such an exchange would not be a productive one; it merely gives you relief from something that would not threaten if not for the possibility of an exchange to get relief from it.⁴⁸

In other words, it is acceptable for the neighbor who honestly wants to build the "monstrosity" to be brought out of this notion, since it is a productive exchange; but, for the bluffer to attempt such a trade, it would be an unproductive imposition. Applying this example to our subject, many cases of blackmail seem allowable.

Imagine that the neighbor builds the monstrosity just because he dislikes you and knows that building it will anger you. Suppose instead that he constructs the monstrosity for the same reason but knows that one response of yours will be to offer him money to desist. Neither of these cases seems to be one of impermissible conduct, and the latter is not, by Nozick's criterion, an unproductive exchange.⁴⁹ If so, isn't a case of blackmail where the collection of information is motivated by dislike of the victim a productive exchange? Only if the blackmailer would not collect the information unless he could threaten the victim with exposure would we have a case of unproductive exchange.⁵⁰

There are problems, however, with this view. Based on the given criteria,⁵¹ which distinguish the productive (both parties benefit and both

47. *Id.* at 84-85. Lord Wright in *Thorne v. Motor Trade Ass'n*, 1937 A.C. 797, would agree:

[A man] may offer not to build on his plot of land if he is compensated for abstaining. He is entitled to bargain as a consideration for agreeing not to use his own land as he lawfully may, and the other man may think it worthwhile to pay him, rather than have the amenities of his house destroyed by an eyesore.

Id. at 820. But according to A. H. Campbell, although "a man may doubtless ask a price from his neighbour for refraining from building and spoiling the neighbour's view," the land must be "building land," and does "not necessarily cover a threat to erect a 'spite fence.'" Campbell, *The Anomalies of Blackmail*, 15 LAW Q. REV. 382, 388 & n.13 (1939).

48. R. NOZICK, *supra* note 10, at 84-85.

49. *Id.* at 84.

50. David Gordon wishes to thank Robert Nozick for very helpful suggestions, and wishes to deny responsibility for the material which appears in Section IV after this point.

51. Nozick appears to equivocate between utilizing this criterion and another one called felicitously by Rothbard the "drop dead" principle. M. ROTHBARD, *supra* note 26, at 240-43, wherein an exchange is nonproductive if the "victim" would be better off if the blackmailer didn't exist at all. At one point, Nozick claims that this second criterion is a necessary condi-

lose if prohibited) from the unproductive (if it were prohibited one party—"the victim"—would be no worse off), the shenanigans of *both* the "honest" builder and the bluffer would be unproductive. Both harm the "victim." *Both*, therefore, should be banned by law. For in *each* case the victim would be no worse off if the activity was thought to be impossible. The honest Dr. Frankenstein should be allowed to proceed, and to be bought off; this is conceded. But so should the bluffing Dr. Frankenstein, for Nozick has failed to maintain a relevant difference between them. It is difficult to see, moreover, why "unproductive" exchanges, in this sense, ought to be prohibited or singled out for special regulations.

Nozick also fails to distinguish between the idea of the activity thought to be impossible and the idea of the activity which is forceably prohibited. In his explanation he uses the two activities interchangeably. Yes, the "victim" would be better off if the blackmailer did not exist, or did not realize it was possible for him to act in such a way. But if the blackmailer did exist, and *did* realize this, the "victim" would be made worse off by forceably prohibiting his activity. In such a scenario the blackmailer would be able to exercise his option of free speech and gossip about the "victim's" secret. Says Rothbard, "outlawing a blackmail contract means that the blackmailer has no further incentive *not* to disseminate the unwelcome, hitherto secret information about the blackmailed party."⁵²

Nozick then launches into a defense of the medieval just-price theory in an attempt to determine precisely how much consideration a blackmailer deserves for his services. "[A] seller of such silence could legitimately charge only for what he forgoes by silence."⁵³ On the face of it, this seems a quixotic argument. Nozick further complicates matters by asserting that a "person . . . who *delights* in revealing secrets[] may charge differently."⁵⁴ Presumably, this amount would be greater than that charged by the blackmailer only interested in pecuniary gains. But this unearths more difficulties than it solves. Asks Rothbard:

Why is it only licit to charge the payment foregone? *Why not* charge whatever the blackmailee is willing to pay? In the first place, both transactions are voluntary, and within the purview of both parties' property rights. Secondly, *no one knows*, either conceptually or in practice, what price the blackmailer could

tion for unproductive activity, R. NOZICK, *supra* note 10, at 84, but later seems to regard it as sufficient. *Id.* at 85-86.

52. M. ROTHBARD, *supra* note 26, at 242.

53. R. NOZICK, *supra* note 10, at 85.

54. *Id.* at 86 n.*.

have gotten for his secret on the market. No one can predict a market price in advance of the actual exchange. . . . [W]hat outside legal enforcement agency will ever be able to discover *to what extent* the blackmailer delights in revealing secrets and therefore what price he may legally charge to the "victim"? More broadly, it is conceptually impossible ever to discover the existence or the extent of this subjective delight or of any other psychic factors that may enter into his value-scale and therefore into his exchange.⁵⁵

Nozick's last contribution to the dialogue consists of this assertion: "Protective services are productive and benefit their recipient whereas the 'protection racket' is not productive. Being sold the racketeers' mere abstention from harming you makes your situation no better than if they had nothing to do with you at all."⁵⁶

This is true enough. But it is not even relevant to our discussion of blackmail, which we have defined as demanding money under the threat of doing something legal. Rather, it is an attack on extortion, as we have defined it, which is the demand for money upon a threat of what one does *not* have the right to do. In a protection racket, the threat is to murder, rape or pillage unless tribute is granted. Nothing said above should be construed as a defense of such an activity. Indeed, we have been at some pain to distinguish extortion, whether or not of the protection racket variety, from legitimate blackmail.⁵⁷

55. M. ROTHBARD, *supra* note 26, at 242-43 (emphasis in original).

56. R. NOZICK, *supra* note 10, at 86.

57. Another person who fails to distinguish between extortion and blackmail is the best-selling author Dick Francis. In his book *The Danger*, the hero, a person whose firm specialized in helping kidnap victims, speaks as follows:

We sometimes did, as a firm, work for no pay; it depended on circumstances. All the partners agreed that a family in need should get help regardless, and none of us begrudged it. We never charged enough anyway to make ourselves rich, *being in existence on the whole to defeat extortion, not to practise it*. A flat fee, plus expenses: no percentages. Our clients knew for sure that the size of the ransom in no way affected our own reward.

D. FRANCIS, *THE DANGER* 147 (1983) (emphasis added).

Francis, in other words, like Nozick, fails to see the crucial difference between, in this case, what the kidnapper does (extortion) and what the hero's firm does (stop extortionate kidnappers). The point is that it does not really matter what the firm charges for its services. It could charge an arm and a leg; it could charge the sun, the moon and the stars; it could even charge more than the ransom demanded by the kidnappers themselves! The firm would *still* not be guilty of extortion, since it would be threatening only that which it has every right to threaten—to withhold its services unless its very high prices were met.

Unless this crucial distinction is maintained, we are in danger of incarcerating innocents who refuse to be good Samaritans (by providing kidnap-rescue services for "high" prices) along with the really guilty parties, the kidnappers.

V. LINDGREN: BLACKMAIL AND THE IMPROPER
USE OF INFORMATION

Another attempt to justify the illegality of blackmail is offered by James Lindgren.⁵⁸ His theory stresses the "triangular nature of the transaction," or "third-party leverage."⁵⁹ In this view, there are really three main actors in the blackmail drama, not two: *A* is the blackmail victim; *B* is the blackmailer; and *C* is the "forgotten man." *C* is the individual ignored in the typical analysis of blackmail, the person who, but for the willingness of *B* to keep a secret, would react negatively to the interests of *A*. In the case of the threat to expose a bed wetter, for example, *C* represents those people who would shun *A*; in the case of the threat to expose a crime, *C* represents the state who would prosecute and incarcerate.

Why, then, in Lindgren's analysis, is blackmail a crime? Because in all cases, *B* is trading in on information to which he has no legitimate title. Says Lindgren:

At the heart of blackmail, then, is the triangular nature of the transaction, and particularly this disjunction between the blackmailer's personal benefit and the interests of the third parties whose leverage he uses. In effect, the blackmailer attempts to gain an advantage in return for suppressing someone else's actual or potential interest. The blackmailer is negotiating for his own gain with someone else's leverage or bargaining chips.

....

... Under my theory, blackmail is the seeking of an advantage by threatening to press an actual or potential dispute that is primarily between the blackmail victim and someone else. The blackmailer threatens to bring others into the dispute but typically asks for something for himself; he turns someone else's power, usually group power, to personal benefit. The bargaining is unfair in that the threatener uses leverage that is less his than someone else's.⁶⁰

Perhaps an example would be useful here. Suppose you discover that a married woman is having an affair. You threaten to tell her husband unless she agrees to commence an affair with you. In Lindgren's view you have intervened in a matter—the status of the couple's marriage—that does not directly concern you. You are attempting to benefit

58. Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984).

59. *Id.* at 702.

60. *Id.* at 702-03.

from information that properly belongs to the couple, or perhaps to the husband.

Lindgren's theory of blackmail cannot be sustained. Why should it be illegal to use information about matters that involve someone else's interests more than one's own? Offhand, this seems a perfectly normal, permissible activity. Suppose, for example, that someone accidentally overhears information about a business deal to which he is not a party. As a result of this information he is able to make a "killing" in the market. Should this be illegal? Or suppose someone, such as a detective, learns of an extramarital affair and sells this information to the spouse of the person involved in the affair. This transaction is clearly legal, yet the seller benefits from information that concerns others more than himself. Lindgren's theory would prohibit this transaction.

Professor Lindgren has anticipated cases of this kind and thinks that he can escape unscathed. He remarks:

[S]ome sales of private information are legitimate. For instance, a police informer may learn damaging information about a criminal and release it to the police in return for money. . . . Under my theory . . . the informer has merely promoted the resolution of the dispute between the government and the criminal on its merits by releasing information to one of the principles. He did not suppress, appropriate or settle the government's interest. The result: no blackmail.⁶¹

Lindgren is quite right in saying that there is no blackmail in this case. But this misses the point. Shouldn't *this* conduct, even though it is not blackmail, also be prohibited? Under Lindgren's principle the person is using information that involves the interests of others more than it involves his interests for his own benefit. It will not do to say that the information-seller has merely added to the available data rather than engaged in suppression, as does the blackmailer. Why is one form of interference better or worse than the other? On what grounds is it being claimed, if indeed it is, that the more information available to the parties the more legal the situation? It is not, at any rate, immediately evident why it is alright to assist a party to a dispute who would benefit by increased knowledge, while one may not help a person who wishes to conceal information.

Lindgren may reply that this criticism ignores the aim of his argument. "[A] core principle of our legal system," he notes, is "the assignment of enforcement rights to the victim: an individual enforces a

61. *Id.* at 706.

private wrong and the state enforces a public wrong."⁶² Blackmail, Lindgren thinks, "suppresses" this fundamental right. In point of fact it does not do so. The victim is as free as before to pursue all his legal remedies. In our example, the husband is not deprived of any of his legal rights by not being told of his wife's adultery. The fact that he might take a certain course of action if he knew about the adultery, which he would not do otherwise, generates no duty in others to assist him to acquire that information. There is, in general, no "right to information"; otherwise, someone who acquired knowledge of an affair, for example, would be under a duty to disclose it. If there were such a "right to information," it would be illegal for attorneys, doctors, economists, and others whose main stock in trade is the sense of providing information.

The fundamental flaw in Lindgren's method of analysis, we suggest, is his loose talk about "leverage" and using "chips" that belong to someone else. While the reader gets some idea of what Lindgren means, his vivid expressions dissolve into unclarity on closer analysis. Exactly what constitutes someone's "chips"? If Lindgren had explicitly stated precisely which rights the blackmailer is allegedly violating, instead of placing crucial reliance on metaphor, he would have seen that his theory depends upon an insupportable claim that one has a duty to provide information to certain persons, whom he terms "victims." The sense in which he uses the word "victim" is also left largely a matter of mystery.⁶³

VI. CONCLUSION

We must conclude, and hope that we have demonstrated, that the efforts of Professors Richard Posner, Richard Epstein, Robert Nozick and James Lindgren have not been successful in demonstrating that blackmail, as opposed to extortion, should remain illegal. Their efforts, of course, have been nothing short of brilliant. Given that one is assigned the task of defending the prohibition of blackmail, it would be hard to see how they could have been more resourceful, creative or insightful.

The authors of the present Article, in contrast, did not start out with any particular position on this issue. This is because, perhaps, we strongly resisted the notion that denigrated, despised and immoral actions necessarily need to be prohibited by law. As a result, in our view, we were able to maintain the distinction between extortion (threatening an act which is in and of itself illegal), which should remain prohibited,

62. *Id.* at 704 (footnote omitted).

63. We do not mean to suggest by these remarks that Lindgren's article is of no value. On the contrary, its criticisms of other theories of blackmail are highly penetrating.

and blackmail (threatening an act which apart from the demand for valuable consideration is legal), which should be legalized.